No. 46964-2-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

NEAL and MARILYN McINTOSH, husband and wife, et al.,

Respondent,

v.

AZALEA GARDENS LLC, dba Azalea Gardens Mobile Home Park,

Appellant.

BRIEF OF APPELLANT AZALEA GARDENS LLC

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A. INTRODUCTION

Azalea Gardens, a high-end rent-controlled mobile home community, sought to temporarily increase rents to fund a park-wide road improvement project. Tenants Neal and McIntosh and 43 other individuals and couples ("tenants") objected, arguing that the project was not a "capital improvement" under the lease, and was Azalea's responsibility. The trial court decided that the tenants were right.

However, this appeal is not about the dispute over funding the road project. It is about a single erroneous finding that will impact future disputes if not corrected. Contrary to the record, the parties' own arguments, and other findings within the same order, the trial court found that when the parties entered into their lease, they meant for the term "capital improvement" to apply to only the construction of a new capital asset, and not to the rehabilitation or replacement of an existing asset. That erroneous new interpretation will apply to future disputes between these parties, and must be remedied in the context of this dispute.

Trial courts have authority to interpret ambiguous provisions in contracts based on extrinsic evidence offered by the parties. However, they may not invent new interpretations that contradict the parties' own evidence. Nor can a trial court's order be upheld when it is internally contradictory.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred when it entered Conclusion of Law Number 14 in its order dated November 21, 2014.

2. The trial court erred when it entered its judgment dated November 26, 2014.

3. The trial court erred in entering the findings of fact and conclusions of law on attorney fees dated November 26, 2014.

(2) Issues Related to Assignment of Error

1. If it is undisputed at trial that the term "capital improvement" in a lease agreement applies to both improvements to existing assets and construction of new assets, does the trial court err when it concludes that the parties meant the term to apply only to new construction? (Assignment of Error 1)

2. Is a conclusion of law clearly erroneous when it directly contradicts other findings and conclusions made within the same order? (Assignment of Error 1)

3. Does a trial court abuse its discretion in concluding that one party substantially prevailed for purposes of a prevailing party lease provision when both parties prevailed on major issues and were afforded relief? (Assignments of Error 2, 3)

4. Must findings of fact and conclusions of law in support of an attorney fee award be specific and meaningful, rather than simply stating the basic standards and filling in the blanks of the requesting party's order? (Assignments of Error 2, 3)

C. STATEMENT OF THE CASE

The tenants are owners of mobile homes and lessees of mobile home spaces in Azalea's facility in Graham, Washington. CP 2-5. According to the tenants, Azalea is a "high end" community. RP 10/21/14 at 29. However, "high-end" does not mean exorbitant rent. In fact, the tenants' leases are 20-year rent controlled leases. CP 163. Rent increases are tied to the Consumer Price Index ("CPI"). *Id.* The leases also provide that if Azalea's property taxes increase or decrease, rents will be raised *or lowered* accordingly. *Id.*

To offset Azalea's inability to generally increase rents to cover the costs of capital improvements, the lease agreements provide that a twelve percent "rate of return" on the funds Azalea expends on capital improvements is to be reimbursed by the tenants as temporary additional rent. *Id.*[1] Temporary increases for capital improvements are allocated equally to each home site, and are not permanent rent increases, but are limited to the period of depreciation of the improved asset. *Id.*

From 2006-2011, Azalea incurred approximately $4,823.61 in street repairs and maintenance. CP 102-07. Azalea never invoked the

[1] Below, there was a dispute over whether the lease allowed Azalea to recoup the amount of the funds expended *plus* the twelve percent rate of return, or just the twelve percent. CP 76. However, Azalea is not appealing from the trial court's interpretation that the lease provides only for recoupment of the rate of return, and not the underlying principal expended on the capital improvement.

capital improvement provision in the leases with respect to these matters, which it considered to be routine maintenance.

In July 2011, Azalea notified the residents that it would be improving the roads in the park with sealcoating, as well as crack-filling and restriping some portions. CP 76. Sealcoating is a process by which asphalt roads are treated and sealed with a protective chemical barrier that prevents their degradation. CP 71. Sealcoating can double or triple the life of asphalt. Crack filling also doubles the life of asphalt by preventing moisture from degrading it. CP 74.

The cost of the project was $20,415.29. CP 76. Azalea sought reimbursement for this project as provided by the "capital improvements" provision in the lease. *Id.* Each tenant's individual share of the cost could be paid in a lump sum or in monthly installments. *Id.*

Many tenants objected to the charge, believing the sealcoating project to be "maintenance" rather than a capital improvement, and thus not subject to the capital improvements provision of the lease. CP 78. They filed a complaint with the Manufactured Housing Dispute Resolution Program ("MHDRP") at the Attorney General's Office. *Id.* The Attorney General's Office took no position on the dispute over whether the project constituted maintenance or a capital improvement. CP 81-86. It did conclude that because the MHLTA did not prohibit passing

capital improvement costs on to tenants, it would not object to the assessment because it was provided for in the lease. *Id.*

The tenants then filed a complaint for breach of the lease and violation of the CPA. CP 1-7. In its answer, Azalea counterclaimed for declaratory judgment that the lease is valid and enforceable. CP 15-16. The tenants' CPA claim was dismissed on summary judgment, and the breach of contract/declaratory judgment claims were tried. CP 205-07.

During the one-day bench trial, the parties disputed whether the sealcoating project met the definition of "capital improvement" in the lease. The tenants argued that the sealcoating project was maintenance, rather than a capital improvement. RP 10/21/14 at 7. Azalea argued that the term "capital improvement" encompassed any project that extended the useful life of an asset, and that the sealcoating qualified. *Id.* at 91-92.

However, neither party presented evidence that they understood the term "capital improvement to mean only brand new construction. In fact, the tenants agreed that the term "capital improvement" could apply to projects involving existing capital assets. RP 10/21/14 at 91. The tenants offered testimony that, for example, laying down a new coat of asphalt on the existing roadway would be a capital improvement, but sealcoating was maintenance. RP 10/21/14 at 70-73.

The tenants argued that the definition of the term "capital improvement" in the lease should be interpreted as consistent with the IRS definition of the term. CP 132; RP 10/21/14 at 78, 81. According to the tenants, that IRS definition of "capital improvement" includes projects that extend the life of an existing asset. CP 132. In other words, the tenants argued, a capital improvement "puts" the existing asset in good condition, while maintenance "keeps" the asset in good condition. CP 132-33; RP 10/21/14 at 78. The tenants called Azalea's accountant to testify to his understanding of the IRS definition of "capital improvement," which he said is a project that "extends the economic useful life of an asset." RP 71. Azalea's accountant also testified that laying new asphalt on an existing roadway would constitute a capital improvement. RP 68.

The trial court found that the sealcoating was maintenance, and not a capital improvement.[2] CP 457 (Appendix at 7). It found that the parties meant the term "capital improvement" in the sense that the IRS uses that term. *Id.* The trial court also found that the term "capital improvement" could apply to projects involving existing assets as well as to new

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[2] Azalea acknowledges that existing law and substantial evidence supports the trial court's finding that the sealcoating constituted a repair or maintenance, rather than a capital improvement. Azalea is not challenging the trial court's conclusion that the sealcoating project is not governed by the capital improvements provision of the lease.

construction, insofar as a capital improvement "puts" the existing asset in its ordinary operating condition. *Id.*

However, contrary to all of these other findings and conclusions, and unsupported by the evidence, the trial court also concluded that the term "capital improvement" as used in the leases *only* meant the construction of entirely new assets, rather than improvements to, or replacement of, existing assets. CP 458 (Appendix at 8). Specifically, the trial court concluded that "a 'capital improvement' as used in the leases refers to a new capital improvement, and not the replacement or repair of an existing capital asset." *Id.*

The tenants requested an award of attorney fees based on the attorney fee provision in the lease. CP 405-08. The tenants' counsel requested a lodestar fee of $39,795.00 based on a $350 hourly rate, and stated that the case warranted a 1.25 multiplier. CP 407. He stated that his $350 hourly rate was his "billing rate for these kinds of matters." CP 411. He did not state whether that rate included a contingent risk factor. *Id.*

The tenants' counsel submitted a two-page declaration in support of the award, to which he attached his billing records. CP 411-12. His declaration did not state that he segregated the time spent on his unsuccessful CPA claims, even though he admitted such segregation was

warranted in his motion.[3] CP 406. For example, many of the billing records contained references to reviewing and working on a response to Azalea's summary judgment motion. CP 416-17. Azalea's successful summary judgment motion to dismiss the tenants' CPA claim was made in the same document as its motion for summary judgment on the breach of contract claim. CP 26-48. The tenants' response to that motion was consolidated. CP 167-86. Yet there was no evidence that any segregation of this time was made.

Azalea raised the segregation issue and a number of other objections to the tenants' fee request. CP 461-73. Azalea argued *inter alia* that the $350 per hour rate and hours expended were unreasonable for the nature of the case and the vicinity, (2) fees should be denied because both parties prevailed on major issues, and that there was no indication of the time records were made contemporaneously. *Id.*

The trial court awarded the tenants $37,432.50 of the $39,795.00 in lodestar fees requested. CP 498.[4] There were no specific findings or conclusions addressing Azalea's objections. The trial court's findings simply stated that the tenants brought an action, that they obtained a

[3] Tenants' counsel stated in his attorney fee motion that he was not claiming time spent on the CPA claims, but did not so state in his sworn declaration, or provide any evidence he had done so. CP 411-12.

[4] The court did not award a multiplier.

judgment that the sealcoating charges should be refunded, and that the leases provided for prevailing party attorney fees. CP 497-98. The trial court's conclusions of law recited the lodestar method, stated that 106.95 hours requested were reasonable, and awarded the fee. *Id.*

Azalea filed a notice of appeal. It seeks to challenge *only* the attorney fee award and the trial court's conclusion that, in the context of future projects, the term "capital improvement" only refers to the construction of new capital assets. Azalea is not appealing from the conclusion that the sealcoating is maintenance, nor challenging the interpretation of how the rate of return is calculated.

D. ARGUMENT

(1) Standards of Review

A trial court's findings of fact must support its conclusions of law and judgment. *Thompson v. Thompson*, 117 Wash. 690, 691, 202 P. 261 (1921); *Brine v. Bergstrom*, 4 Wn. App. 288, 290, 480 P.2d 783 (1971). If they do not, then the trial court's decision must be reversed. *Id., see also*, *Penchos v. Ranta*, 22 Wn.2d 198, 205, 155 P.2d 277 (1945); *Littlefair v. Schulze*, 169 Wn. App. 659, 667, 278 P.3d 218 (2012), *as amended on denial of reconsideration* (Sept. 25, 2012). Also, findings of fact and conclusions of law must reveal the process used by the decision maker and

the basis for her decision. *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 36, 873 P.2d 498 (1994).

This Court reviews an attorney fee award for abuse of discretion. *Chuong Van Pham v. City of Seattle,* 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Discretion is abused when the trial court exercises it on untenable grounds or for untenable reasons. *Id.*

(2) The Undisputed Evidence and the Trial Court's Own Findings State that the Parties Defined the Term "Capital Improvement" Consistent with the IRS Definition, Which Includes Improvements to Existing Assets

The trial court was tasked with discerning what the parties meant by the term "capital improvement" in the lease. "The touchstone of contract interpretation is the parties' intent." *Tanner Electric Coop. v. Puget Sound Power & Light,* 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 942, 974 P.2d 1261 (1999). Words in a contract should be given their ordinary meaning. *Corbray v. Stevenson,* 98 Wn.2d 410, 415, 656 P.2d 473 (1982).

Courts interpret contracts as a whole. *Berg v. Hudesman,* 115 Wn.2d 657, 669, 801 P.2d 222 (1990); *Syrovy v. Alpine Res., Inc.,* 122 Wn.2d 544, 551, 859 P.2d 51 (1993). Courts interpret unambiguous contracts as a matter of law. *Paradiso v. Drake,* 135 Wn. App. 329, 334, 143 P.3d 859 (2006), *review denied,* 160 Wn.2d 1024, 163 P.3d 794

(2007). Ambiguity will not be read into a contract where it can reasonably be avoided. *McGary v. Westlake Investors,* 99 Wn.2d 280, 285, 661 P.2d 971 (1983); *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 944, 974 P.2d 1261, 1266 (1999). A contract provision is not ambiguous merely because the parties suggest opposite meanings. *Id.* at 421.

"A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning." *Mayer v. Pierce County Med. Bureau,* 80 Wn. App. 416, 421, 909 P.2d 1323 (1995). When the court is asked to determine the meaning of what is written, and not what was intended to be written, extrinsic evidence is admissible to determine the parties' intent. *Martinez*, 94 Wn. App. at 946, citing *Berg*, 115 Wn.2d at 667. "Under *Berg,* interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.,* 120 Wn.2d 573, 582, 844 P.2d 428 (1993).

Here, the tenants' evidence and argument at trial was that the term "capital improvement" in the lease included, consistent with IRS definitions, any project that puts a capital asset in good condition. CP 132-33, 290-91; RP 38, 78. Then the tenants argued to the trial court that

the IRS definition applied: "And our contention is that the IRS guidelines are highly relevant to interpreting the term "capital improvements." RP 10/21/14 at 38.

The tenants were correct in asserting that IRS regulations define "capital improvements" to include projects that restore or replace existing assets:

> The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as an expense, provided the cost of acquisition or production or the gain or loss basis of the taxpayer's plant, equipment, or other property, as the case may be, is not increased by the amount of such expenditures. *Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, shall either be capitalized* and depreciated in accordance with section 167 or charged against the depreciation reserve if such an account is kept.

Section 1.162–4, Income Tax Regs; *Jenkins v. C.I.R.*, 44 T.C.M. (CCH) 510 (T.C. 1982) (emphasis added). Incidental repairs and maintenance neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition. 26 C.F.R. § 1.162-4. However, amounts expended in restoring property are capital improvements if they add to the value of the property, substantially prolong its life, or adapt the property to a new or different use. 26 C.F.R. § 1.263(a)-1(a), (b) (1976).

Federal case law also confirms that the IRS definition of "capital improvement" includes restoration or replacement of existing assets. *Moss v. C.I.R.*, 831 F.2d 833, 835 (9th Cir. 1987). In that case, the Ninth Circuit Court of Appeals described the "often-litigated distinction between repair expenses and capital improvements" in tax cases. *Id.* It is characterized as the difference between "keeping" and "putting" a capital asset in good condition. *Id.* The test is that if the improvements were made to "put" the particular capital asset in efficient operating condition, then they are capital in nature. If, however, they were made merely to "keep" the asset in efficient operating condition, then they are repairs and are deductible. *Id.*, citing *Estate of Walling v. Commissioner,* 373 F.2d 190, 192-93 (3d Cir. 1967). Thus, according to the IRS regulations and supporting case law, a project to replace or restore an existing capital asset constitutes a "capital improvement."

Even assuming *arguendo* that the tenants' own definition of "capital improvement" was not identical to the IRS definition, they agreed that it could apply to restoration or replacement of existing assets. CP 132. For example, the tenants offered testimony that laying down a new layer of asphalt on an existing roadway would constitute a capital improvement. RP 10/21/14 at 70. This evidence is in keeping with the

tenants' position that a capital improvement does not simply mean brand new construction.

(3) Despite Agreeing that "Capital Improvement" as Used in the Lease Should Be Consistent with the IRS Definition, the Trial Court Concluded that the Parties Meant the Term "Capital Improvement" to Refer Only to Brand New Asset Construction

The trial court agreed with the tenants that the IRS definition of "capital improvement" – which includes projects that restore or replace an existing asset – was the parties' intended meaning of the term in the lease. CP 457 (Appendix at 7). In Conclusion of Law 9, the trial court found that a "capital improvement"...refers not to repairs or maintenance, but in the sense or similar to usage in IRS regulations...." *Id.* In Conclusion of Law 10, the trial court also found that a capital improvement, as distinguished from a repair, "puts the asset into its ordinary operating condition...." *Id.*

However, despite explicitly finding that capital improvements could be made to existing assets, the trial court stated in Conclusion of Law 14 that "capital improvement" in the lease means only "a new capital improvement, *and not the replacement* or repair of an existing capital improvement." CP 458 (Appendix at 8). The finding that the term applies only to construction of entirely new capital assets is unsupported by the

record and contradicts the trial court's own findings and the identical positions of both parties on that issue.

To compound the error, the trial court found that the parties intended the term "capital improvement" to have a different meaning when the improvement is ordered by the government: "A capital improvement mandated by a government agency, however, need not relate to a new capital improvement." *Id.* A finding that the parties intended a different meaning of "capital improvement" depending on whether the project is initiated by Azalea or a government agency is unsupported by the record and has no basis in the text of the lease agreement. CP 163. The lease draws no distinction between capital improvements ordered by an agency or those chosen by Azalea. *Id.*

The trial court's various findings are inconsistent with each other and are completely unsupported by any evidence in the record. Even the tenants did not take the position that restoration or replacement of an existing asset would not constitute a capital improvement. Conclusion of Law 14 is unsupported by the record and the arguments of the parties.

(4) Because the Trial Court's Finding Regarding the Definition of "Capital Improvements" May Apply to Future Lease Disputes, This Court Should Reverse It

This case comes to this Court in a somewhat unusual posture. Azalea is not challenging the trial court's specific findings or judgment on

the issue of the sealcoating and whether it is a capital improvement. Azalea acknowledges that although the matter was disputed, substantial evidence supports the trial court's finding on that issue. Azalea is not asking for reversal of the judgment in the tenants' favor regarding the sealcoating project. Thus, it may appear as if the trial court's Conclusion of Law 14 is moot.

However, the trial court's finding is not moot. In its counterclaims, Azalea asked for declaratory judgment regarding the definition of the term "capital improvement" in the lease. CP 15. Also, if a dispute over this lease term arises again, the tenants would likely argue that this issue is subject to the principle of collateral estoppel.

This Court should reverse the trial court's Conclusion of Law 14 and remand this case for entry of a revised order that properly reflects the evidence and arguments adduced at trial. The definition of capital improvements should be, as the trial court found, consistent with IRS definitions, and should be allowed to include appropriate capital improvement projects involving existing assets.

(5) The Trial Court Abused Its Discretion in Awarding Attorney Fees to the Tenants

Attorney fees should not have been awarded because both parties prevailed on major issues. The tenants sought a ruling that the sealcoating

was not a capital improvement, and Azalea sought declaratory judgment regarding the meaning of the term "capital improvement."

The trial court also failed in its task of examining the tenants' fee request. The court awarded the tenants the full amount of attorney fees requested, without scrutiny or explanation. This kind of "rubber-stamp" fee award is not permitted in Washington

(a) Both Parties Should Bear Their Own Attorney Fees Because Neither Party Substantially Prevailed

The lease here provides that in any litigation, the prevailing party is entitled to reasonable attorney fees. CP 166. That provision makes an award of attorney fees to the prevailing party mandatory under RCW 4.84.330. *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217, 130 P.3d 892 (2006). As provided by that statute, a prevailing party is the party in whose favor final judgment is rendered. *Id.* If neither party wholly prevails then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief afforded the parties.

However, if both parties prevail on major issues, each party bears its own costs and fees. *Seashore Villa Ass'n v. Hugglund Family Ltd. P'ship*, 163 Wn. App. 531, 547, 260 P.3d 906 (2011); *Rowe v. Floyd,* 29 Wn. App. 532, 535, 629 P.2d 925 (1981). In *Rowe*, a contract to purchase orchard land had an attorney fee provision. The buyers failed to make a

scheduled payment of $20,000. They argued that a clause required adjustment if frost damage diminished the crop, and offered only $833 instead of $20,000. The sellers sued for forfeiture. The court dismissed the complaint for forfeiture but calculated the appropriate payment was $16,475, not $833, and gave the buyers four months to pay up.

The *Rowe* court refused both parties' requests for prevailing party attorney fees. Division I of this Court affirmed: "In the language of the judgment and its practical effect, both parties were favored by the order appealed from." *Rowe,* 29 Wn. App. at 535-36. The statutory definition of "prevailing party" applied equally to buyer and seller; "neither or both prevailed." *Id.*

In *Marassi v. Lau,* 71 Wn. App. 912, 859 P.2d 605 (1993), *overruled on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 491, 200 P.3d 683 (2009), Division I of this Court said that the substantially prevailing standard set forth in *Rowe,* although "appropriate in some cases," is inadequate "where multiple distinct and severable contract claims are at issue." *Marassi,* 71 Wn. App. at 917. The Court observed that the plaintiffs had prevailed, but only on two of twelve claims, and thus the question of which party had substantially prevailed was "extremely subjective and difficult to assess." *Id.* Instead, a trial court should take a "proportionality approach" when requested to award

prevailing party attorney fees. "A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon. The fee awards are then offset." *Id.* at 917.

Here, both parties prevailed on major issues. The tenants prevailed on the question of whether the sealcoating project qualified as a capital improvement and the method of calculation, and obtained a refund of the costs they were billed for that project. CP 459. However, Azalea prevailed in their declaratory judgment action, in which they requested that the trial court define the term "capital improvement" as used in the lease in order to prevent future litigation. CP 457-58.[5]

The trial court should have offset each separate successful claim and ordered each party to bear its own attorney fees.

(b) The Trial Court Abused Its Discretion in Accepting Without Scrutiny the Tenants' Attorney Fee Declaration, and in Failing to Enter Adequate Findings and Conclusions

A trial court must be active, not passive, in evaluating attorney fee awards. *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998).

[5] Although the trial court included one paragraph defining "capital improvement" in a way that neither party advanced nor any evidence supported, that does not diminish that Azalea succeeded in its claim. The fact that the trial court entered declaratory judgment that is contrary to what the parties sought at trial should be reversed, as explained *supra*. When this Court reverses a trial court ruling and renders each party as substantially prevailing, reversal of a prevailing party fee award is appropriate. *Seashore Villa,* 163 Wn. App. at 547.

"Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel." *Id.* at 434-35. As Division I of this Court recently stated, the trial court "must do more than give lip service to the word 'reasonable.' The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis." *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013), *review denied sub nom.*, *Berryman v. Farmers Ins. Co.*, 179 Wn.2d 1026, 320 P.3d 718 (2014).

Further, any discussion of reasonable hourly rates must take into consideration the nature of the billing firm and the nature of the work performed. *West v. Port of Olympia,* 146 Wn. App. 108, 192 P.3d 926 (2008). In *West*, this Court upheld the trial court's decision to limit the hourly rate of the undersigned for PRA trial work to $250 per hour. *Id.* at 123. This Court explained that the type of work, rather than simply the resume of the attorney claiming fees, is relevant. *Id.*

Time spent on unsuccessful efforts in connection with otherwise successful claims is unproductive and must be excluded. *Pham v. City of Seattle*, 159 Wn.2d 527, 539-40, 151 P.3d 976 (2007). This Court has observed that segregation is *compulsory*, even when a party seeking fees claimed the time spent on theories for recovery were intertwined:

"Regardless of the difficulty involved in segregation…the trial court has to undertake the task." *Smith v. Behr Processing Corp.,* 113 Wn. App. 306, 344-45, 54 P.3d 665 (2002).

After this careful review process, the court must support an award of attorney fees with specific findings of fact and conclusions of law. *Mayer v. City of Seattle,* 102 Wn. App. 66, 82–83, 10 P.3d 408 (2000), *review denied,* 142 Wn.2d 1029, 21 P.3d 1150 (2001). Those findings and conclusions must specifically address the challenged time entries and explain why they have been granted or denied. *Id.*

In *Berryman,* Division I of this Court rejected an attorney fee award in which the trial court simply filled in the blanks in the prevailing party's proposed order, without examining the request or the opposing party's objections. *Berryman,* 177 Wn. App. at 657. The *Berryman* Court reiterated the *Mahler* admonition that trial courts must be active in evaluating fee requests and objections thereto, and remanded for entry of "meaningful" findings and conclusions. *Id.* at 677-78.

Here, the trial court simply "filled in the blanks" of the proposed fee order without much scrutiny, similar to the trial court in *Berryman.* CP 498. The findings and conclusions were *pro forma,* general statements about the applicable standards, with no specificity. *Id.* No mention was made of the segregation issue, despite the fact that Azalea raised it. *Id.* In

fact, the trial court failed to address *any* of the specific concerns Azalea raised about unreasonable time, duplicative time, the $350 per hour billing rate, or any other objection. The trial court simply granted the request without scrutiny and almost in full. This is reversible error. *Berryman,* 177 Wn. App. at 658-59.

More scrutiny of the fee request was warranted. This Court should reverse and remand for entry of meaningful findings and conclusions that address Azalea's many concerns and objections raised in connection with the fee request.

E. CONCLUSION

A trial court should not enter findings and conclusions that are internally contradictory and inconsistent with the evidence and positions of the parties at trial. The court here erred in concluding that the term "capital improvement" meant something that neither party claimed it to mean at trial. The court also erred in granting the tenants' fee request without scrutiny, meaningful examination, or specific findings and conclusions. The orders at issue should be reversed and remanded for new findings and conclusions consistent with the facts and law.

DATED this 7th day of May, 2015.

Respectfully submitted,

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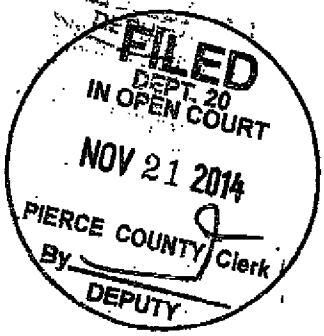
APPENDIX



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

NEAL and MARILYN McINTOSH, husband and wife; RON and JEANINE ARNSBERG, husband and wife; SALLY BARLOW, an individual; DON and CAROL BRENNAN, husband and wife; GEORGIA BROUILLETTE, an individual; JUNE DAVIDSON, an individual; MIKE and DENICE DITTERICK, husband and wife; ELMA JEAN EDWARDS, an individual; KEN and PAT EISENBEIS, husband and wife; KENNETH and UTHA FOX, husband and wife; ALAN and SHERYLE FULLER, husband and wife; KEITH and DARLENE GARNER, husband and wife; DENNIS and ALICE GEORGE, husband and wife; RICHARD and GINNY GILBERT, husband and wife; LOIS GROSZ, an individual; ROBERT and SANDI HARDAWAY, husband and wife; JERRY and VERL HENDERSON, husband and wife; CONRAD and JACKLYN HINKLE, husband and wife; PHIL and SHARON HURD, husband and wife; TERRIL JOHNSON, an individual; EDWARD and TRACEY KEIRNS, husband and wife; WALT and JUDY KUEHITHAU, husband and wife; DUANE LAFORE, an individual; RUSS and SHARON LUNAU, husband and wife; JOHN and BARBARA MADDOCK, husband and wife; BILL and THERESA MARTIN, husband and wife; DON McCANN, an individual; HAL and KAY McEWEN, husband and wife; ELEANOR NEWTON, an individual; ERNIE and MARY ANNE READ, husband and wife; MEL and GILL RICHARDSON, husband and wife; YVONNE RICHTER, an individual; JERRY and NANCY SAMESHIMA, husband and wife; DANIEL and HELGA SANTOS, husband and wife; NORMA SHERIDAN, an individual; THEO and MARRY SLUYS,

NO. 12-2-13664-1

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Amended

husband and wife; JEANETTE STATKUS, an individual; CURTIS and ELSIE STOUT, husband and wife; LYLE and DONA SUNDSMO; husband and wife; ROLLIE and BILLIE TILSTRA, husband and wife; JOANNE VanGORDER, an individual; ROY VASERENO, an individual; and REESE and EDITH WYMAN, husband and wife,

Plaintiff,

vs.

AZALEA GARDENS LLC, d/b/a Azalea Gardens Mobile Home Park,

Defendant.

THIS MATTER coming before the undersigned this date following the bench trial of this cause on October 21, 2014, the Court having considered the exhibits admitted into evidence, the witnesses testifying at trial and the stipulation of the parties contained in the Joint Statement of Evidence, does hereby enter the following:

FINDINGS OF FACT

1. The plaintiffs are owners of manufactured homes and the lessees of lots in Azalea Gardens Manufactured Housing Community in Graham, Washington ("Azalea Gardens")..

2. Each plaintiff (or plaintiff husband and wife) executed either a 25-year or 20-year fixed-term lease.

3. The leases provide for increases in rent according to increases in the Consumer Price Index, as well as various other increases, such as increases in real estate taxes.

4. The tenants are also required to pay extra vehicle and extra recreational vehicle storage charges, if they store such vehicles, as well as a $21 "monthly sewer charge" (Lease, ¶ 3) and utility charges supplied to their lots (Lease, ¶ 4). Tenants are also responsible for their "individual sewer step system, which is an integral part of their home; this includes periodic preventive maintenance, repair of sewer step system pump and sewer step lines, and periodic pumping of holding tank located on said manufactured home lot."

5. The leases do not mention who pays the expense of maintaining the roads in the park, or for that matter, any other park maintenance.

6. The advertising materials used to attract tenants to the park stated that the homeowner did not have to pay for "[m]aintenance of streets" and other items, and pointed out that such a provision was a benefit of long-term lot leases (Exhibit 2).

7. Paragraph 2 of all of plaintiffs' leases provides as follows, with the "Owner" being the owner of Azalea Gardens, also referred to as the "Landlord", and the "Residents" being the tenants in Azalea Gardens, some of whom are also plaintiffs in this lawsuit:

> As additional rent, the Owner shall be compensated by Resident (1/97th per space) on the basis of computation of a twelve percent (12%) rate of return for funds expended on capital improvements either mandated by a governmental entity or deemed necessary by Owner. The charge to the Residents shall be allocated equally to each homesite. The twelve percent (12%) rate of return to the Owner shall be for a period not to exceed the period of depreciation of such improvement.

8. In 2011, the Landlord decided to "sealcoat" the asphalt roads in Azalea Gardens.

9. Seal coating is a process by which a protective coating is put on asphalt to slow its degradation. Sealcoating functions in the same way as any protective coating. Like painting a house or sealing a deck, it puts a barrier between degradants and the asphalt surface (Exbibit 6).

10. It is recommended by pavement maintenance professionals that (a) seal coating be applied regularly, even on new pavement; (b) seal coating be applied approximately every three to five years; and (c) seal coating is best performed by a professional pavement maintenance contractor (Exhibit 6).

11. Workmen here sprayed the seal coating material, which resembles a thin, black paint, onto the asphalt roads.

12. Seal coating is part of normal and routine maintenance of asphalt roads.

13. Crack sealing, or filling in cracks that have developed in the road, is also part of

routine maintenance (Exhibit 7).

14. The defendant Landlord obtained a bid for seal coating the asphalt roads in the park, repairing approximately 150 square feet of asphalt, and repainting some stripes in the parking area near the park clubhouse (Exhibit 8).

15. The Landlord paid $26,521.95 to Northwest Striping and Sealing LLC of Yakima ("Northwest") for completion of the work described in the bid.

16. The Landlord took the position that the tenants' leases required the tenants to pay "the pro-rated portion of the cost of capital improvements" (Exhibit 5).

17. Tenants questioned whether the work was needed, when the roads appeared to be in good condition.

18. The Landlord responded that overall the roads were in good condition and that no extensive repairs were needed, but "caring for the roads during their lifespan is a capital expenditure" (Exhibit 5).

19. Tenants questioned whether seal coating the roads and the other work was a "capital improvement" or simply maintenance.

20. The Landlord responded to tenants' questions by stating that in the business of real estate investments and property management, the determination of expenses as being either "maintenance" or a "capital improvement" is generally determined by IRS guidelines, and that taxpayers were generally required to capitalize expenses that substantially prolong the life of property (Exhibit 5).

21. The Landlord stated to tenants that it would depreciate the project over time as a capital expense pursuant to "IRS code" (Exhibit 5).

22. The Landlord's accountant, Mark Middlesworth, testified that he classified the project as a capital improvement, and accounted for it in that manner, because he was told by Christy Mays (the park's regional manager), that an overlay of asphalt was put down on the road surface, as opposed to just sealing the road.

23. Mr. Middlesworth also credibly testified that seal coating, crackfilling and restriping would constitute repairs. Seal coating, in his opinion, would be a repair because it usually doesn't substantially improve the economic useful life of an asset.

24. The basis for the Landlord's tax accounting treatment was incorrect, as the seal coating involved in this case did not include any significant laying of asphalt.

25. The Landlord charged $20,415.59 to its tenants, including plaintiffs, or $210.47 per tenant, for the seal coating, asphalt repair and repainting of stripes.

26. The Landlord divided the amount of $20,415.59 by 97 (the number of lots in the park) to determine each tenant's proportionate share of the work.

27. Each individual plaintiff and each husband and wife plaintiff paid $210.47 on the dates and in the amounts identified in Exhibit 13.

28. The Landlord charged the tenants who elected to pay the $210.47 in installments, interest at the rate of 12% per annum on the unpaid balance.

29. Plaintiffs contended that the work performed by Northwest was maintenance, and not a capital improvement, but paid the amount charged by the Landlord, and filed the present action to recover the amounts paid.

30. In 2006, the Landlord paid a certain sum to Northwest Asphalt, Inc. of Renton for seal coating and repairing a portion of the roads and drains in Azalea Gardens. The tenants were not charged for the 2006 work.

From the foregoing Findings of Fact, the Court now enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. The court must decide the meaning of the contract that was entered into by the plaintiffs and the defendant Azalea Gardens and specifically under section 2, the paragraph as follows:

> As additional rent, the Owner shall be compensated by Resident (1/97th per space) on the basis of computation of a twelve percent (12%) rate of return for funds expended on capital improvements either mandated by a governmental entity or deemed necessary by Owner. The charge to the Residents shall be allocated equally to each home site. The twelve percent (12%) rate of return to the Owner shall be for a period not to exceed the period of depreciation of such improvement.

3. The court is required to look at the context rule for ascertaining the parties' intent and interpreting written contracts. To determine the intent of the parties, the court must look at the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations of each party. Berg v. Hudesman, 115 Wn. 2d 657, 801 P. 2d 222 (1990)

4. The Owner, defendant, drafted the lease. There were no negations regarding the language of the lease, there was no real intent expressed by plaintiff except the reasonableness of the rental amount and it was attractive that rate increases would be tied to the Consumer Price Index (CPI). The paragraph in question was not discussed.

5. Defendant's interpretation of the contract as demonstrated in Exhibits 3 and 4 is contrary to the express language in the contract. The contract does **not** provide for 12% interest. It requires a 12% rate of return for funds expended on capital improvements.

6. The main issue before the court is the definition of the term "capital improvements."

7. Improvement as defined by Black's law dictionary is "A valuable addition made to property or an amelioration in its condition, amounting to more than mere repairs or replacement ...and intended to enhance its value, beauty or utility or to adapt it for new or further purposes."

8. In this case, the seal coating, crack filling and repainting stripes are part of ordinary maintenance and are not "capital improvements" as that term is used in the leases signed by the parties.

9. A "capital improvement" as that term is used in the leases refers not to repairs or maintenance, but in the sense ~~as used~~ of similar to usage in IRS regulations, i.e., to improvements of a capital nature, such as new buildings, facilities, permanent improvements, or betterments made to increase the value of property.

10. The distinction between the two concepts is frequently expressed in terms of whether the expenditure in question "keeps" or "puts" the asset into its ordinary operating condition. If the expenditure "keeps" the asset in its ordinary operating condition, the expenditure is considered an expense for maintenance and repair. If the expenditure "puts" the asset into its ordinary operating condition, then the expense is of a capital nature.

11. ~~Seal coating the roads and filling cracks in the roads do not add significantly to the value of the roads and do not extend the life of the roads from an IRS perspective, as~~ Seal coating, just like painting a house, is required to maintain the roads in good operating condition. The Landlord's argument that seal coating extends the life of the roads is like the argument that any repair or maintenance extends the life of the asset involved; it does in the sense that if seal coating or painting is not done, the asset will be degraded much earlier, but seal coating and painting are commonly done to preserve the expected life of the asset, ~~and so do not extend the life of the original road as seal coated, or the original house as painted from the beginning~~. In other words, preventing an asset from deteriorating through routine maintenance does not convert the action from deductible maintenance to a capital improvement.

12. The apparent rationale for the tenants' paying "additional rent" for funds the Landlord expended on "capital improvements" is that (1) the tenants would benefit from new facilities, e.g., swimming pool, nature trail, new roads, enlargement of the clubhouse, etc., and (2) the landlord would receive a gain or profit, i.e., not only the value of the asset itself (and presumably the increased value of the park), but also the 12% profit on the monies it expended on capital improvements.

* A capital improvement mandated by a government agency, however, need not relate to a new capital improvement.

13. ~~The portion of paragraph 2 quoted above was also intended to protect tenants, and tenants receive protection by construction of a "capital improvement" as coming within the parameters of the IRS interpretation of a "capital improvement."~~

14. The portion of paragraph 2 of the leases, as quoted in Finding of Fact No. 7, is ambiguous, in that it is sometimes difficult to determine whether an expenditure is for a "capital improvement" or not. Due to that ambiguity, and others in paragraph 2, which the Court must construe against the Landlord as drafter of the leases, and the context in which the leases were negotiated and signed, the Court concludes that a "capital improvement" as used in the leases refers to a new capital improvement, and not the replacement or repair of an existing capital improvement.

(*) 15. The Landlord also used the incorrect formula to calculate its reimbursement for funds expended on proper capital improvements. The total amount of the expenditure on capital improvements should be divided by the number of lots in the park (97), and the tenants of each lot reimburse the Landlord by paying an annual 12% return on such tenants' pro rata share. The annual share is divided by 12 to calculate the monthly amount, which is added to the tenants' rent for that month, since the clause in question refers to the Landlord's compensation as 'additional rent."

16. Thus, if the work at issue in this case were a proper capital expense, the $20,415.59 would be multiplied by 12% to calculate the amount of the Landlord's annual rate of return, which would be $2,449.87. Each tenant's annual share of that is 1/97, or $25.25. The amount each tenant would pay per month as additional rent would by 1/12th of the annual amount, or $2.10. The length of time the tenant would pay this additional rent would not exceed the period of depreciation of the capital improvement, and would be limited to the life of the improvement.

17. Even in the absence of any provision in the leases regarding maintenance, the Landlord has a statutory duty to "[m]aintain the common premises." RCW 59.20.130(1). Roads are common premises, as they are used by all the tenants in common. The park owner also has the specific duty to "[m]aintain roads within the mobile home park in good condition[.]" RCW 59.20.130(9).

18. Since the amounts paid by the plaintiffs to compensate the Landlord for the seal coating, crack filling and paint striping were not related to capital improvements, the Landlord breached the leases with the plaintiffs when the Landlord charged such amounts, and the Landlord should return to plaintiffs all such amounts paid, including any interest paid.

19. The amounts paid by the plaintiffs are set forth in Exhibit 13. Judgment should be entered in favor of each such plaintiff in the amount of such sum paid by each plaintiff, plus pre-judgment interest from the date(s) of payment, since the amounts paid are liquidated.

20. Plaintiffs, as prevailing parties, are entitled to costs and reasonable attorney's fees under paragraph 27 of the leases and under RCW 59.20.110, the amounts to be determined by subsequent motion.

DATED this 21 day of Nov. 2014.

JUDGE KITTY-ANN van DOORNINCK

By _____
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Attorney for Plaintiffs/Counterclaim Defendants

By _____
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FILED
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IN OPEN COURT
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PIERCE COUNTY, Clerk
By _____
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DECLARATION OF SERVICE

On said day below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 46964-2-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 7th, 2015 at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK TRIBE

May 07, 2015 - 10:56 AM

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